

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:KYT:NAS:TL-N-2059-00

HPLevine, ID# [REDACTED]

date: 4/20/00

to: Chief, Appeals Division, Kentucky-Tennessee District
Attention: Appeals Officer Mike Wagner

from: District Counsel, Kentucky-Tennessee District, Nashville

subject: [REDACTED]

Whether statute extension is subject to I.R.C. § 6501(c)(4)(B)

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ISSUE:

Whether the statute extension that was secured in this case is subject to I.R.C. § 6501(c)(4)(B) where it was solicited before December 31, 1999, signed and returned in [REDACTED] but re-requested to correct a ministerial error?

CONCLUSION:

[REDACTED]
, (b)(7)a

(b)(7)a

FACTS AND DISCUSSION:

[REDACTED] has filed a protest to the 30-day report and currently has a case pending in [REDACTED]. A statute extension was solicited on [REDACTED]. The signed extension was received in [REDACTED]. Because of a ministerial error on the statute extension, it was re-requested on [REDACTED]. The notice provisions of I.R.C. § 6501(c)(4)(B) were not complied with. The taxpayer again signed and returned the statute extension.

I.R.C. § 6501(c)(4)(B) was one of many provisions enacted by Congress in RRA 1998 which was intended to apprise the taxpayer of its rights in making an informed decision. I.R.C. § 6501(c)(4)(B) requires the Internal Revenue Service to advise the taxpayer that it may: (1) refuse to extend the statute of limitations; or (2) limit the extension to particular issues or to a particular period of time. I.R.C. § 6501(c)(4)(B) is applicable for all requests to extend the statute of limitations made after December 31, 1999.

As a purely legal matter, the issue in this case is whether the [REDACTED] solicitation of the new extension to correct a clerical error was a request to extend the statute of limitations subject to I.R.C. § 6501(c)(4)(B). The alternative is that the request relates back to the initial solicitation, that is, [REDACTED].

Since there is no history or analogous situations to draw upon, the Internal Revenue Service should take the position that the [REDACTED] request was a request subject to I.R.C. § 6501(c)(4)(B).¹ The statute is very specific - it requires the Internal Revenue Service to notify the taxpayer of its "rights" "on each occasion when the taxpayer is requested to provide such consent." By its literal terms, I.R.C. § 6501(c)(4)(B) applies

¹

(b)(7)a

to the [REDACTED] solicitation since it was an occasion when the taxpayer was requested to provide consent. (b)(7)a [REDACTED]

Although the Internal Revenue Service must advise the taxpayer of its right to decline to extend the statute of limitations or limit it by issues to a certain period of time, the Internal Revenue Service can refuse to extend the statute of limitations if the taxpayer seeks to limit it. Although this appears to be inconsistent with the notice requirements, that is, the language reflecting that the Internal Revenue Service must notify the taxpayer that it has the right to limit the consent, the taxpayer has no such right. Nor does the taxpayer have a right to a statute extension. Rather, the taxpayer can merely attempt to persuade the Internal Revenue Service to allow this.

The taxpayer in this case may seek a restrictive consent. This may be problematic since the Internal Revenue Service has an historically strict policy on the use of restricted consents. IRM 4541.7, Restricted Consents, should not be ignored. The Internal Revenue Service always has the option of issuing a notice of deficiency. The RRA 98 National Resource Center acknowledged that IRM 4541.7 requires revision. Questions 316, 401. The RRA 98 National Resource Center also anticipated that most taxpayers in Appeals will request restricted consents, and it is anticipated that IRM 8233 will also be revised.

There may also be problems in properly reflecting the scope of the consent if a restrictive consent is sought. In this regard, the Tax Court in Microsoft Corporation v. Commissioner, T.C. Memo. 1998-54 held that the language in a restricted consent was not sufficiently broad to permit the Internal Revenue Service to recalculate the taxpayer's affiliated group's combined taxable income under the I.R.C. § 936(h) profit-split method. The Internal Revenue Service attempted not only to disallow the adjustment on the improper use of the profit split method, but to also allow it to recalculate the income under that method. The court found that the restrictive language, which is interpreted as a matter of mutual assent as determined by the objective manifestations, did not so permit. In making this determination, the court focused on the language used, to wit:

² Letters 907(DO) (2-2000) and 967 (Rev. 12-1999) have been modified and are available for this purpose. Publication 1035 is also available. The best practice is to advise taxpayers of their "rights" with the letters.

The amount of any deficiency assessment is to be limited to that resulting from ... potential adjustments including any consequential changes to other items based on such adjustments:

(1) The ... proposed adjustment relating to the disallowance of ... use of the profit split method of computing taxable income for purposes of section 936(h) ... and any pricing adjustments resulting from such disallowance ...

The court focused on the "disallowance" of the "use" language and found that the intent was to limit the consent to the failure to qualify for the profit split method. Since the Internal Revenue Service's alternative position presumed the allowance of the profit split method, it was beyond the scope of the restricted consent and therefore, the statute of limitations expired.

The Microsoft court set out several facts which led it to the conclusion. Included in these facts was reference in the restricted consent to the Internal Revenue Service's "proposed adjustment". The alternative position was not however included in the notice of proposed adjustment or 30-day letter. A key to avoiding problems with restricted consents may be to draft appropriate language. Restrictive consents require careful drafting, an understanding of alternative adjustments and positions and collateral consequences. We can assist you in drafting and/or reviewing any restrictive language sought by the taxpayer in this case or other cases.

Please contact the undersigned at extension 5072 if you have any questions. Attached is a client survey which we request that you consider completing.

JAMES E. KEETON, JR.
District Counsel

By: /s/ HPL
HOWARD P. LEVINE
Senior Attorney

cc: ARC (TL Roy Allison (via e-mail))
cc: ARC (LC) Don Williamson (via e-mail)
cc: Blaise Dusenberry (via e-mail - information only)